the ingredients of the offence of murder, and if he does not do so, the absence of such a direction must be fatal to a conviction."

Before proceeding further two observations require to be made regarding these cases.

The first of these is that each of them is to be considered in the light of its own particular facts.

In *Hashim's* case it was never in question that the accused killed the deceased, but there was considerable controversy at the trial as to his state of mind at the material time. The trial Judge failed to point out to the assessors the necessity for the prosecution to prove intention or knowledge in terms of section 300 of the Penal Code and it was this that was held to be a fatal non-direction.

In *Manap's* case the defence was that though the accused, who was himself seriously injured, was admittedly in company with the deceased woman at the time when she met her death, he had no knowledge as to how she and himself came by their injuries. Again the trial Judge in effect treated killing and murder as being the same thing and gave no direction at all on the question of intention.

The second observation to be made is that in neither case is there any suggestion that in a murder trial it is incumbent on the trial Judge to explain to the jury at length the whole law relating to murder or indeed to go any further in dealing with the ingredients of murder than is necessary to enable the jury to answer intelligently the questions of whether or not the accused is guilty or not guilty of that offence or, if it arises, whether he is guilty or not guilty of some other offence. As was said by Lord Alverstone, L.C.J., in the case of *Hampton*,[3]

"A summing-up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial."

The present case was conducted throughout on the basis that it was a case of murder or nothing and it was on that basis that, in our opinion quite rightly, it was in the end put to the jury by the trial Judge. It was the case for the prosecution that the nature of the dead woman's injuries showed that she had been deliberately battered to death by some person using a heavy blunt instrument with considerable force and that the evidence as a whole pointed irresistibly to the conclusion that the person who had thus deliberately killed her was the appellant. The defence was one of *alibi* and that it was not the appellant who had killed her.

In the circumstances it is not surprising that the trial Judge did not find it necessary to deal at any great length with the law by which the jury were to be guided. He pointed out that the accused was charged with murder and that there could be no question of a verdict of manslaughter:

"The issue before you is a straightforward one of guilty of murder or not guilty at all."

He went on to explain that observation by discussing the evidence (which was uncontradicted) as to the circumstances and condition in which the body was found, and concluded that portion of his summing-up by saying:—

"You may well think and, indeed, have no doubt whatever, that the person who inflicted those savage and brutal injuries on her had only one intention, and that was to kill her. So it is for that reason that I say that the only issue for you is one of guilty or not guilty of murder."

He then went on to point out that it was the duty of the prosecution to prove the charge of murder against the accused beyond all reasonable doubt and that it was not for the accused to prove his innocence. He then proceeded to deal with the evidence at length.

It is easy to imagine circumstances in which the direction which has been quoted would have been woefully inadequate. What we were concerned with, however, was the particular circumstances of the present case and in these we were satisfied that no reasonable jury could have been in two minds as to the question which they had to answer and that was whether or not they were satisfied that it was the appellant who had inflicted the fatal injuries on the dead woman and that he could only have done so with the intention of killing her.

Appeal dismissed.

Re PETER WONG; Ex parte the DEBTOR

[C.A. (Chua, Wee Chong Jin and Ambrose JJ.) October 15, 1958]

[Singapore — Civil Appeal No. 3 of 1958]

Bankruptcy — Bankruptcy Ordinance (Cap. 11), s.104 — Power of Court to annul adjudication where debtor ought not to have been adjudged bankrupt is discretionary.

This was an appeal by Peter Wong, a debtor, against a decision of the High Court reported in (1958) M.L.J. 116. He applied to the High Court to annul the adjudication order and rescind the receiving order made against him. The ground of his application was that the act of bankruptcy alleged in the petition, namely, the Sheriff's *nulla bona* return, was not a valid act of bankruptcy, as he was, at the date of the return,

possessed of property liable to seizure. The High Court refused his application.

At the hearing of the appeal, counsel for the debtor contended (i) the High Court had no discretion to refuse to annul the adjudication order where the debtor ought not to have been adjudged bankrupt and (ii) the High Court exercised its discretion wrongly by refusing to annul the adjudication.

Held: (1) the power given to the Court by section 104 of the Bankruptcy Ordinance is discretionary;

(2) the discretion was not wrongly exercised.

Re Yap E. Boon[1] distinguished.

Cases referred to:—

(1) *Re Yap E. Boon*, (1933) M.L.J. 217.

(2) *Re Dunn*, (1949) 1 Ch. 640; (1949) 2 All E.R. 388.

(3) *MacDougall v. Paterson*, (1851) 21 L.J.C.P. 27.

COURT OF APPEAL.

N. A. Christopher for the debtor.

M. Karthigesu for a creditor.

Abdul Wahab Ghows (Ag. Official Assignee) in person.

The facts and arguments sufficiently appear in the judgment of Ambrose J. below.

Cur. Adv. Vult.

Chua J.: — I have had the opportunity of reading the judgment of Ambrose, J.

I agree with the reasons Ambrose, J. gives for dismissing this appeal and I have nothing to add of my own.

Wee Chong Jin J.: — This is an appeal from the High Court in Bankruptcy refusing an application made under section 104(1) of the Bankruptcy Ordinance by Peter Wong, a debtor, asking the Court to annul the adjudication order made against him on the 11th February, 1957. Section 104(1) provides as follows:—

"104. — (1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full..... .....the Court may annul the adjudication."

The debtor had been adjudged bankrupt on a petition presented by a creditor. The act of bankruptcy relied on was that the Sheriff had made a return that the debtor was possessed of no property liable to seizure under a writ of seizure and sale. At the hearing of the petition on the 11th February, 1957 the debtor disputed the alleged act of bankruptcy and filed an affidavit in support in which he affirmed that he had goods in stock worth more than $38,000 and was interested in a big housing scheme. The learned Judge sitting in Bankruptcy after hearing the oral testimony of the solicitor for the petitioning creditor who testified that the debtor had interviewed him in his office on the 15th January, 1957 and had informed him at that interview that he had no assets, having sold them all previously and applied them in part payment of his debts, made a receiving order and an adjudication order against the debtor.

Subsequently the debtor made an application under section 104(1) to annul the adjudication on the ground that the act of bankruptcy relied on, namely, the Sheriff's *nulla bona* return, was not a valid act of bankruptcy since the debtor was, in fact, possessed of property liable to seizure at the date of the Sheriff's return. In support of his application the debtor adduced additional evidence that at the date of the Sheriff's return he was in fact possessed of property liable to seizure. The Court below accepted the additional evidence adduced but decided that it had a discretion under section 104(1) to grant or refuse applications for annulment of adjudications and, in the particular circumstances of this case, refused to exercise its discretion in favour of the debtor.

The only point for the determination of this Court is whether or not, the Sheriff's return being in fact incorrect, the power conferred upon the Court by section 104(1) is discretionary or not. In the course of the argument, Counsel for the debtor abandoned the other point raised in his Memorandum of Appeal, namely, that assuming the Court below had a discretion in the matter, the discretion had been wrongly exercised. In any event I am of the opinion, for the reasons set out by Ambrose J. whose judgment I have had the opportunity of reading, that there had been no wrongful exercise of discretion by the Court below.

Counsel for the debtor contended as follows. Once the Court had come to the conclusion that at the date of the Sheriff's return the debtor was possessed of property liable to seizure and that therefore the Sheriff's *nulla bona* return was, in fact, incorrect then the debtor had not committed the act of bankruptcy relied on by the petitioning creditor. As there was no act of bankruptcy it followed, so Counsel contended, that the debtor ought not to have been adjudged bankrupt because the very foundation of the Court's jurisdiction to make an adjudication order, namely an act of bankruptcy committed by the debtor, is removed. Counsel relying on the decision of the Court of Appeal in the case of *Yap E. Boon*[1] has therefore invited this Court to say that as the debtor ought not to

have been adjudged bankrupt the adjudication must be annulled, the Court having no discretion under section 104(1).

I am unable to accept Mr. Christopher's attractive argument which he has forcefully urged before us. In my opinion the fallacy in his argument becomes apparent on a consideration of the relevant provisions of sections 3, 6 and 24 of the Ordinance.

The relevant provisions of section 3 read as follows:—

"A debtor commits an act of bankruptcy.....if the Sheriff.....makes a return that the debtor was possessed of no property liable to seizure; and for the purposes of this clause the date when the writ is lodged with the Sheriff .....shall be deemed to be the date of the act of bankruptcy."

The relevant provisions of section 6 read as follows:—

"(2) At the hearing the Court shall require proof of—

(a) the debt of the petitioning creditor; and

(b) the act of bankruptcy.....and if satisfied with the proof may make a receiving order in pursuance of the petition.

(3) If the Court is not satisfied with the proof of petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

The relevant provisions of section 24 read as follows:—

"(1) At the time of making a receiving order the Court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the Court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors....."

In this case it is not now disputed and indeed it is in my opinion indisputable that at the time when the adjudication order was made i.e. at the hearing of the petition on the 11th February, 1957, the order was properly made and that the Court in making the order was acting within the powers conferred upon the Court by the Ordinance. There was then before the Court proof which satisfied the Court that the debtor had committed the act of bankruptcy alleged in the petition, namely, the Sheriff's *nulla bona* return. In my opinion as it is clear that this order was in the first instance properly made, this is not a case which falls within section 104(1) of the Bankruptcy Ordinance. It cannot be said that the debtor ought not to have been adjudged bankrupt.

I will now deal with the matter on the assumption that, in the light of the facts subsequently adduced but which were in existence at the date of the making of the adjudication order, the order ought not to have been made. Mr. Christopher said that if the order ought not to have been made the Court has no discretion under section 104(1) but must annul the adjudication. The relevant words of section 104(1)—

"Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt.....the Court may annul the adjudication"

clearly in my opinion give a discretionary power to the Court. It is true that in the case of *Yap E. Boon, supra*, the Court of Appeal held that where an adjudication order was made on a petition by a creditor whose debt was not in existence at the date of the act of bankruptcy relied on, the Court, on an application under section 104(1), had no discretion to refuse to set aside the order. It was not in dispute in that case that there was a well established rule that no adjudication order will be made where the petitioning creditor's debt was not in existence at the date of the act of bankruptcy relied on. In law therefore no adjudication order could be made against the debtor in *Yap E. Boon's case* and it follows that the adjudication order which was in fact made was *ab initio* one which could not properly be made. As Terrell J. puts it (at page 220)—

"It is common ground that the Order ought *never* to have been made and I think it follows logically that the present appellants are entitled as a matter of right to have it set aside."

(the underlining is mine), and as Cobbett J. also puts it—

".....the debtor ought *never* to have been adjudicated and therefore I would allow the appeal."

(the underlining is also mine). Accordingly in my view *Yap E. Boon's case* is authority only for the proposition that where an adjudication order could not *ab initio* properly be made on the bankruptcy petition as presented, then on an application under section 104(1) the Court must annul the adjudication and has no discretion in the matter. For my part I would have preferred to give effect to the clear intention of the legislature as shown by the language used in section 104(1) and to have come to the conclusion on the facts in *Yap E. Boon's case* that it was a proper case for the Court to exercise its discretion in favour of that debtor and to accordingly annul the adjudication.

I am fortified in my view that section 104(1) confers a discretionary power on the Court by a passage in the judgment of Lord

Evershed in the case of *Re Dunn*[2] where at page 644 the learned Master of the Rolls said of section 29(1) of the Bankruptcy Act of 1914 — which is in *pari materia* with our section 104(1):

"It is to be observed that the power of the Court under section 29 is discretionary, 'the Court may, on the application.....by order annul the adjudication'."

For all these reasons I am of the opinion that the appeal should be dismissed.

Ambrose J.: — This is an appeal by Peter Wong, a debtor, against a decision of the High Court refusing his application to annul the adjudication order and rescind the receiving order made against him.

A bankruptcy petition was filed against the debtor on the 11th January, 1957, the act of bankruptcy alleged being that the Sheriff did on the 9th January, 1957, make a return that the debtor was possessed of no property liable to seizure under a writ of seizure and sale, which was lodged with the Sheriff on the 7th January, 1957. The petition was heard on the 11th February, 1957. The debtor disputed the alleged act of bankruptcy. He stated in an affidavit affirmed on the 7th February, 1957, that he was the proprietor of Lip's Company, that he had goods in stock worth more than $38,000, and that he was interested in a housing scheme involving approximately $600,000. The solicitor for the petitioning creditor, however, testified that the debtor interviewed him at his office on the 15th January, 1957, without requesting that the interview should be treated without prejudice, and stated that he had no assets whatsoever, that all his assets had been sold some time previously, and that the proceeds had been applied in part payment of his debts. The learned Chief Justice, not being satisfied on the evidence before him that the Sheriff's return was incorrect, made receiving and adjudication orders against the debtor on the 11th February, 1957.

The debtor made an application to the Court for annulment of the adjudication order and rescission of the receiving order, on the ground that the act of bankruptcy alleged in the petition was not a valid act of bankruptcy, as the debtor was, in fact, at the date of the Sheriff's *nulla bona* return possessed of property liable to seizure. The application was heard by the learned Chief Justice on the 17th, 20th and 21st January, 1958. The debtor adduced certain additional evidence, which satisfied the Court that he was possessed of property liable to seizure at the date of the Sheriff's return and that the Sheriff's return was incorrect. The Court decided, however, that it had a discretion to grant or to refuse applications for the annulment of adjudications and, taking into consideration the debtor's long history of duplicity and equivocation and lack of candour, dismissed his application.

The debtor appealed against this decision. At the hearing of the appeal, counsel for the debtor contended that the Court had no discretion to refuse to annul the adjudication order. He referred to section 104(1) of the Bankruptcy Ordinance which provides as follows:

"Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, ... the Court may annul the adjudication."

He relied on the case of *Re Yap E. Boon.*[1] In that case the point actually decided by the Court of Appeal was that the Court must set aside receiving and adjudication orders made at the instance of a creditor whose debt was not in existence at the date of the act of bankruptcy relied on. The reasoning of Terrell, J., was as follows. The Court should apply the well-established English rule that the petitioning creditor's debt must have been in existence at the time of the act of bankruptcy on which the bankruptcy petition is founded. As that rule had not been complied with, the adjudication order had been wrongly made. As the debtor ought not to have been adjudged bankrupt, the Court had no discretion to refuse to set aside the adjudication order. Although the decision of the Court of Appeal was right, I consider that the approach to the problem by Terrell, J., was not quite correct.

The proper approach in dealing with an application for annulment of an adjudication is that adopted by the Court of Appeal in *Re Dunn.*[2] In that case Evershed, M.R., said (at p. 390) that the power given to the Court by section 29(1) of the Bankruptcy Act, 1914, is discretionary. That section corresponds to section 104(1) of the Bankruptcy Ordinance and provides as follows:

"Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication."

He considered that the word "may" gives the Court a discretion. In his view, before the Court will exercise its discretion in favour of the applicant, the applicant must satisfy the Court that the circumstances of the case are

such that the Court must annul the bankruptcy. This is clearly indicated by the following words of the learned Master of the Rolls:

"I think the official receiver (the applicant) must go so far as to say that the Court, in the circumstances of this case, must annul the bankruptcy."

Terrell, J., construed the section relating to annulment of adjudications in a manner inconsistent with the intention of the Legislature and the view of the Courts in England. He was influenced by the rule stated by Jervis, C.J., in *MacDougall v. Paterson*[3]:

"When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application."

In that case the Court of Common Pleas had to construe section 13 of the County Courts Act, 1850. That section provided that with regard to certain actions brought in a Superior Court, when the plaintiff recovers a sum not exceeding £20, the Court, in certain specified circumstances, "may direct that the plaintiff shall recover his costs". Jervis, C.J., considered the position before the passing of the County Courts Act, 1846, and sections 11, 12 and 13 of the County Courts Act, 1850, and came to the conclusion that section 13 did not give the Court a discretion but only conferred upon it an authority, which it was bound to exercise if it appeared that the case was one in which concurrent jurisdiction was given to the Superior Courts. As it is clear from the judgment of Evershed, M.R., in *Re Dunn* that section 29(1) of the Bankruptcy Act, 1914, confers a discretion on the Court, the rule stated by Jervis, C.J., in *MacDougall v. Paterson* does not apply to section 29(1) of the Bankruptcy Act, 1914, or to section 104(1) of the Bankruptcy Ordinance.

Counsel for the debtor relied on the *dictum* of Terrell, J., in *Re Yap E. Boon* that, where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, the Court has no discretion to refuse to set aside an order which was in effect wrongly made. I regard this as an *obiter dictum* because it was not strictly necessary for the decision in that case. In *Re Yap E. Boon* the Court of Appeal could have arrived at the decision which it gave by saying that the circumstances were such that the receiving and adjudication orders must be set aside and that the Court accordingly exercised its discretion in favour of the applicant. I, therefore, reject the contention of counsel for the debtor that the Court below had no discretion to refuse to annul the adjudication order.

The second contention of counsel for the debtor was that the learned Chief Justice exercised his discretion wrongly by refusing to annul the adjudication order. He eventually abandoned this contention, but as it was argued at length I have thought it necessary to state my views regarding it. He contended that, as soon as the learned Chief Justice had found that the Sheriff's *nulla bona* return was incorrect, the act of bankruptcy on which the bankruptcy petition was based disappeared, and without that statutory pre-requisite the receiving and adjudication orders could not stand. It must be noted, however, that the act of bankruptcy was disputed by the debtor at the hearing of the bankruptcy petition, and the Court below decided that there was a valid act of bankruptcy after hearing the evidence adduced by both the petitioning creditor and the debtor. The debtor has only himself to blame, if the Court in arriving at that decision took into consideration the fact that he had admitted to the solicitor for the petitioning creditor that he had no assets. The Court, having found that the Sheriff's *nulla bona* return was correct, made receiving and adjudication orders against the debtor. Those orders are valid until set aside. The Court below was subsequently satisfied that the Sheriff's *nulla bona* return was incorrect in the light of facts which existed at the time the orders were made but emerged later and, therefore, that those orders ought not to have been made. The Court had a discretion as to whether it should set aside the orders, and in exercising the discretion was bound to consider all the circumstances of the case including the debtor's conduct. Here it must be stated that where the Court below has exercised its discretion the Court of Appeal will pause long before it interferes. In exercising his discretion, the learned Chief Justice very properly took into consideration the debtor's long history of duplicity and equivocation and lack of candour, and came to the right conclusion that there was no good reason why the Court should exercise its discretion in the debtor's favour and annul the bankruptcy.

What injustice has the debtor suffered? If he had revealed to the solicitor for the petitioning creditor on the 15th January, 1957, the assets which he disclosed to the Court about a year later, the information would in all probability have been passed to the Sheriff, who would have promptly seized the property with the result that there would have been at the date of the hearing of the bankruptcy petition an un-

questionable act of bankruptcy under section 3(1)(e) of the Bankruptcy Ordinance. Further, regard must be had to the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. According to his statement of affairs, which he took a very long time to file, the debtor's liabilities amounted to $297,950.02 at the date of the receiving order made against him, and his assets amounted to $21,500. To my mind he is hopelessly insolvent. It is clearly contrary to the interests of the public that the receiving and adjudication orders made against the debtor should be rescinded and annulled and that he should thereby be enabled to go on trading.

I must add, however, with all due respect to the learned Chief Justice, that, although I agree with him that the adjudication order in *Re Yap E. Boon* was bad in law, I do not agree that it was void *ab initio* and that it was a nullity. The distinction between the case of *Re Yap E. Boon* and the present case is this. In *Re Yap E. Boon*, the adjudication order being bad in law *ab initio*, the circumstances were such that it had to be annulled and, therefore, the Court must be regarded as having exercised its discretion in favour of the applicant, although the Court said it had no discretion to refuse to set aside the adjudication order. In the present case, the adjudication order was properly made in the first instance, but facts established later satisfied the Court that the adjudication order ought not to have been made, and the Court, having considered the circumstances of the case, decided that it ought not to annul the bankruptcy, and refused to exercise its discretion in favour of the applicant.

Before I conclude, I must deal with a criticism made by counsel for the debtor of the following passage in the judgment of the learned Chief Justice:

> "So also in this case, even if the Sheriff's return was incorrect, nevertheless if the petitioning creditor honestly believed on reasonable grounds (that is to say on the faith of the Sheriff's return) that the debtor had no property liable to seizure, the adjudication was initially good."

He submitted that the petitioning creditor's belief had nothing to do with the matter. Here it must be pointed out that the learned Chief Justice was comparing the present case with *Re Dunn*, where Denning, L.J., (as he then was) said:

> "Even if the debt was unenforceable, nevertheless if the debtor honestly believed on reasonable grounds that he was unable to pay his debts the adjudication was good and should not be annulled *ab initio*."

This was an answer to the official receiver's contention that the debtor's petition was an abuse of process of the Court and that, therefore, the adjudication order ought to be annulled on the ground that it ought not to have been made The learned Chief Justice's remarks were, similarly, an answer to the contention of counsel for the debtor that it was an abuse of process of the Court to found a bankruptcy petition on a Sheriff's *nulla bona* return which was subsequently proved to be incorrect.

For the above reasons, I come to the conclusion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *de Souza & Christopher; Allen & Gledhill.*

PHAN POW v. TUCK LEE MINING & CO.

[O.C.J. (Ong J.) October 27, 1958]

[K.L. — Civil Suit No. 276 of 1958]

Practice and Procedure — Leave to pay amount of Judgment by instalments — R.S.C. 1957, O. 42 r. 17 and O. 72 r.2 — Want of Jurisdiction — Present practice.

In this case the plaintiff Phan Pow, a mine foreman, obtained judgment on July 30, 1958 against the defendants, his former employers, for the sum of $3,892.12 inclusive of costs. The writ was duly served on all 10 partners in the defendant firm.

On August 26, 1958 the defendants filed a notice of motion applying for an order that they be given leave to pay the amount of the judgment by instalments of not less than $150 per month with effect from September 1, 1958. It was supported by an affidavit of the defendants' managing partner setting out the grounds of their inability to pay, purportedly complying with the provisions of the English R.S.C., O.42 r.19. Their object was to seek a stay of execution. The plaintiff subsequently on 18th September applied for execution, but the writ of seizure and sale was not issued pending the disposal of the defendants' application.

At the hearing plaintiff's counsel opposed the application on the ground that in the Federation Rules of the Supreme Court 1957, there was no r.19 under Order 42, and in the absence of such rule, the Court had no jurisdiction to make any order on this application.

Held: (1) an order for payment by instalments is only a form of stay of execution in the case of a decree for payment of money, and the repeal of the Civil Procedure Code together with the absence of r.19, do not effect the jurisdiction of the Court, in a proper case, to Order a stay for such time and subject to such terms as it may in its discretion think fit;

(2) under Order 72 r.2 it is permissible to call in aid the provisions of the present English Order 42 r.19, which in fact does not conflict with the practice heretofore followed in Malaya in making an order for stay of execution upon granting leave to pay by instalments.